LIBRARY
SUPREME COURT, U. S.

FILED
NOV 16 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 718

JOHN HERBERT CUDMORE, *Petitioner,*

v.

RICHARDSON-MERRELL, INC., *Respondent.*

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas

RESPONDENT'S BRIEF IN OPPOSITION

DONALD L. CASE,
JACK PEW, JR.,
4300 First National Bank Bldg.,
Dallas, Texas 75202,
Counsel for Respondent.

Of Counsel:
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
4300 First National Bank Bldg.,
Dallas, Texas 75202.

November 16, 1966.

WARLICK PRESS, INC.—2323 VALDINA STREET—DALLAS—RI 1-2120

INDEX

	Page
Opinion Below	2
Objection to Jurisdiction	3
Question Presented	5
Statutes Involved	5
Statement	5
Argument	11
I. The only issues in this case are issues of Texas common law.	11
II. The Court of Civil Appeals properly disposed of the issues in this case, and was correct in affirming the trial court's judgment.	14
III. The Petition for Writ of Certiorari does not and cannot show that the Texas special issue practice is unconstitutional.	22
IV. The matters outside the record upon which Petitioner relies are immaterial to the issues in this case.	24
Conclusion	25
Proof of Service	25

Page

Cases

Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360 (1957) 23
Aycock v. Travis County, 255 S.W. 2d 910 (Tex. Civ. App., 1953), writ refused 21
Baker v. Texas & Pacific Ry. Co., 359 U.S. 227 (1959) 23
Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W. 2d 5 (1959) 20
Burrus Feed Mills, Inc. v. Reeder, 391 S.W. 2d 121 (Tex. Civ. App., 1965) no writ history 12, 15
Casagrande v. F. W. Woolworth Co., 340 Mass. 552, 165 N.E. 2d 109 (1960) 17
Cochran v. Brooke, Ore., 409 P. 2d 904 (1966) 17
Copperweld Steel Company v. Industrial Commission of Ohio, 324 U.S. 780 (1945) 23
Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A. 2d 513 (1960) 17
Davis v. North Carolina, 196 F. Supp. 488 (D.C.N.C. 1961), reversed, 310 F. 2d 904 (4 Cir., 1962) 23
Edward E. Morgan Co. v. U.S., 230 F. 2d 896 (5 Cir. 1956), cert. den., 351 U.S. 965 (1956) 23
El Paso & Southwestern R. R. Co. v. Eichel, 226 U.S. 590 (1913) 4
Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P. 2d 298 (1963) 17, 18
Freeman v. Freeman, 160 Tex. 148, 327 S.W. 2d 428 (1959) 5
Grau v. Proctor & Gamble Company, 324 F. 2d 309 (5 Cir., 1963) 20
Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W. 2d 835 (1942) 12, 15
Hansberry v. Lee, 311 U.S. 32 (1940) 23
Howard v. Avon Products, Inc., 155 Colo. 444, 395 P. 2d 1007 (1964) 17, 18, 20
Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942) 12, 15

Page

Lartique v. R. J. Reynolds Tobacco Company, 317 F. 2d 19 (5 Cir., 1963), cert. den. 375 U.S. 865 (1963) 20

Lone Star Gas Company v. Sheaner, 157 Tex. 508, 305 S.W. 2d 150 (1957) 21

McCorquodale v. State of Texas, 211 U.S. 432 (1908) 4

Magee v. Wyeth Laboratories, Inc., 29 Cal. Rptr. 322 (Cal. App., 1963) 17

Matthews v. General Accident Fire & Life Assur. Corp., 161 Tex. 622, 343 S.W. 2d 251 (1961) 18

Merrill v. Beaute Vues Corp., 235 F. 2d 893 (10 Cir., 1956) 17

Moore v. Dilworth, 142 Tex. 538, 179 S.W. 2d 940 (1944) 4

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 4

Ray v. J. C. Penney Company, 274 F. 2d 519 (10 Cir., 1959) 17

Ross v. Philip Morris & Company, 328 F. 2d 3 (8 Cir., 1964) 20

Senior v. Braden, 295 U.S. 422 (1935) 23

St. Louis Southwestern Railway Company v. Gregory, Tex., 387 S.W. 2d 27 (1965) 20

Texas Employers' Insurance Association v. Jones, Tex., 393 S.W. 2d 305 (1965) 18

Wallace v. Scrogum, Tex., 372 S.W. 2d 941 (1963) 4

Ware v. Paxton, Tex., 359 S.W. 2d 897 (1962) 4

Waters-Pierce Oil Company v. State of Texas, 212 U.S. 112 (1909) 4

Page

Wortham v. Bull, 19 S.W. 2d 211 (Tex. Civ. App., 1929), writ refused 21

Texts

26 A.L.R. 2d 963 (1952) 20

Barron and Holtzoff, Federal Practice and Procedure, § 1051 (1961) 22

Hursh, "American Law of Products Liability," § 8:2 (1961) 20

Keeton, "Products Liability—Current Developments," 40 Tex. L. Rev. 193 (1961) 19

Keeton, "Products Liability—Liability Without Fault and the Requirement of a Defect," 41 Tex. L. Rev. 855 (1963) 15, 16, 20

Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale Law Journal 1099 (1960) 16

Restatement of Torts 2d § 402A (1965) 16, 17, 20

Stayton, "Texas' Approaches to the Parker Ideal and Her Shortcomings," 37 Tex. L. Rev. 845, 855 (1959) 22

Rules

Federal Rules of Civil Procedure, Rule 49(a) 23

Texas Rules of Civil Procedure, Rule 277 ..... 5, 22

Texas Rules of Civil Procedure, Rule 279 5

U. S. Supreme Court Rules, Rule 23(f) 4

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 718

JOHN HERBERT CUDMORE,

Petitioner,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas

---

RESPONDENT'S BRIEF IN OPPOSITION

To the Supreme Court of the United States:

This is a personal injury case—pleaded, tried, appealed, and decided solely upon issues of Texas common law. No federal statute or cause of action is involved. Petitioner, as plaintiff, brought this suit in a Texas state district court,

where it was tried before a jury. In accordance with Texas practice, and with Petitioner's acquiesence, the fact issues involved were submitted to the jury by means of special interrogatories. (Tr. 37-44.) The jury answered the controlling issues against Petitioner and in favor of Respondent (Tr. 37-44), and the trial court entered judgment on such verdict that Petitioner take nothing against Respondent. (Tr. 47-49.) The Texas Court of Civil Appeals affirmed, *398 S.W. 2d 640*, and the Supreme Court of Texas denied Petitioner's Application for Writ of Error without written opinion. Petitioner conceded in the state courts (and does not deny here) that the jury's findings of fact are sustained by the evidence and support the judgment for Respondent. His position in state court was that, in submitting Petitioner's "implied warranty" count to the jury, the trial court's charge employed language that did not accurately reflect the law of Texas. And, although his Petition for Writ of Certiorari is interlarded with such phrases as "due process," "denial of jury trial," and "unconstitutional," that is his position here. The entire purpose of the Petition for Writ of Certiorari is to obtain further review of points of Texas law that the Texas courts have decided against Petitioner.

OPINION BELOW

The opinion of the Texas Court of Civil Appeals is reported at 398 S.W. 2d 640 and is copied in Appendix "A" to the Petition for Writ of Certiorari. The orders by which the Texas Supreme Court refused Petitioner's Application

for Writ of Error and Motion for Rehearing of his Application for Writ of Error are at pages A-14 and A-15 of the Petition for Writ of Certiorari.

OBJECTION TO JURISDICTION

Petitioner says that the question he seeks to present to the Court is,

> "Whether the Texas courts through the use of the 'special issue' charge to jury have the power to deny Petitioner a jury trial on one of the theories of his cause of action which was properly pled and proved, in violation of Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States." (Petition for Writ of Certiorari 3.)

The Petition for Writ of Certiorari shows on its face that such question was not raised in the trial court (Petition for Writ of Certiorari 7-9) or in the Court of Civil Appeals (Petition for Writ of Certiorari 9-10), that it was not mentioned or ruled upon by the Court of Civil Appeals, *398 S.W. 2d 640* (Petition for Writ of Certiorari Appendix "A"), and that it was not raised in Petitioner's Application for Writ of Error in the Texas Supreme Court (Petition for Writ of Certiorari 11-12) or mentioned or ruled upon in the order which denied such Application for Writ of Error. (Petition for Writ of Certiorari A-14). The Petition further shows that the first and only time *any* federal question was alleged in state court was in the Seventh Point of Petitioner's Motion for Rehearing of his Application for Writ of Error in the Supreme Court of Texas. (Petition for Writ of Certiorari

12-15.)[1] The Texas Supreme Court is without jurisdiction to consider a point first raised at that stage of the proceeding, *Wallace v. Scrogum*, Tex., 372 S.W. 2d 941 (1963); *Ware v. Paxton*, Tex., 359 S.W. 2d 897 (1962); *Moore v. Dilworth*, 142 Tex. 538, 179 S.W. 2d 940 (1944), and it overruled Petitioner's Motion for Rehearing, without an opinion, by an order (Petition for Writ of Certiorari A-15) which read in its entirety as follows:

> "Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled."

Clearly, then, the attempt to raise a federal question came far too late. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *El Paso & Southwestern R. R. Co. v. Eichel*, 226 U.S. 590, 598 (1913); *Waters-Pierce Oil Company v. State of Texas*, 212 U.S. 112, 118 (1909); *McCorquodale v. State of Texas*, 211 U.S. 432, 436-437 (1908). Petitioner has wholly failed to show, and he cannot show, that his federal question "was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." *Rule 23(f), Rules of the Supreme Court of the United States.*

[1] This Court might well conclude that the federal question Petitioner raised on rehearing in state court is not the same question he presents here. Petitioner's Seventh Point on rehearing in the Texas Supreme Court merely alleged "that the trial court erred in failing to grant the Petitioner a trial by jury of his cause of action against the Respondent based on the breach of implied warranty of fitness * * *." (Petition for Writ of Certiorari 13.) Such Seventh Point did not say or suggest that the alleged denial of a jury trial was caused (as Petitioner now insists) by the use of a special issue charge.

QUESTION PRESENTED

Whether this Court will grant certiorari, in a common law personal injury action tried in state court, to review the decisions of the state trial and appellate courts on issues of state law.

STATUTES INVOLVED

It cannot be accurately said that this case involves any federal statute or constitutional provision. Nor, as the Petition for Writ of Certiorari makes plain, is any state statute really involved. The Petition does say (p. 4) that *Rule 277* and *Rule 279, Texas Rules of Civil Procedure*, are "Statutes Involved,"[2] but, after making the unsupported statement (p. 2) that such Rules violate the Fourteenth Amendment, and after copying them in its Appendix "B," the Petition never mentions such Rules again.

STATEMENT

The following is submitted in lieu of the "Statement" in the Petition for Writ of Certiorari.

After suffering a severe heart attack, Petitioner (plaintiff in the trial court), upon the advice and prescription of his doctor, a heart specialist, took a cholesterol inhibiting drug known as MER/29. Alleging that he had developed cataracts, flaking skin, and loss of hair therefrom, he brought this suit against Respondent, MER/29's manufacturer.

[2] The Texas Rules of Civil Procedure, of course, are not statutes, but it has been said that they do "have the same force and effect as statutes." *Freeman v. Freeman*, 160 Tex. 148, 154, 327 S.W. 2d 428, 433 (1959).

Petitioner's pleadings claimed that his damages had been "proximately" caused by negligence, gross negligence, breach of express warranty, and breach of implied warranty on the part of Respondent. (Tr. 3-15.) At the trial, however, he abandoned the gross negligence and express warranty counts.

The case was tried to a jury for seven days. The more than 1000 typewritten pages of testimony included evidence that MER/29 was a pure, unadulterated product (S.F. 896), developed in response to medical demand for a cholesterol reducing agent (S.F. 202, 618-619); that MER/29 did effectively perform this function (S.F. 167, 658, 852-853); that, after extensive testing, described at length in the evidence (S.F. 275, 393-397, 402-403, 646, 660-662, 839-855), MER/29 was placed on the market, available only by prescription, in June 1960 (S.F. 647); that Petitioner used it from August 1960 to March 1961 (S.F. 36-37); that if Petitioner developed cataracts therefrom, they were an "abreaction"—a reaction that exists in so few people that it is totally unpredictable (S.F. 748, 866); that during the pre-market testing period, MER/29 had been given to more than 2,000 persons (some in enormous dosages), none of whom developed cataracts (S.F. 647); and that from the time MER/29 first went on the market in June 1960, until the time Petitioner ceased to take it in March 1961, it had been used by an estimated 262,000 persons and there had been only *one claim* of cataracts—a claim which was brought to Respondent's attention in February 1961 and, despite extensive investigation, could ever be verified. (S.F. 649, 656.)

The jury found, in answer to the negligence issues, that Respondent did not fail to make adequate tests of MER/29 (Special Issue No. 8) and that Respondent did not conceal facts which the purchasing public was entitled to receive (Special Issue No. 10); it found, in answer to the implied warranty issues, that Petitioner's cataracts and loss of hair were not proximately caused by MER/29 (Special Issues Nos. 2 and 6), that his flaking skin was proximately caused by MER/29 (Special Issue No. 4), and that the MER/29 consumed by Petitioner was not unmerchantable and unfit for the purpose for which it was intended. (Special Issue No. 7.) In answer to special issues which embraced Respondent's defenses to "implied warranty," the jury found that Petitioner's cataracts were the result of an "abreaction" to MER/29 (Special Issue No. 15) and that, at the time Petitioner was taking MER/29, the state of medical knowledge was such that Respondent could not have anticipated in the exercise of ordinary care that MER/29 might cause cataracts in the lens of the human eye. (Special Issue No. 16.)

In answer to Special Issues Nos. 13 and 14, the jury found that Petitioner had sustained $28,250.00 in damages from cataracts, flaking of skin, and loss of hair. There is no evidence or indication that the jury desired or thought that such $28,250.00 would be charged to Respondent. In short, the assertion at page 9 of the Petition for Writ of Certiorari, that the jury "tried to award plaintiff $28,250.00 (Tr. 42) not knowing the effect of their answers to the Special Issues (Tr. 42)," has no support in the record—or, indeed, anywhere else.

Judgment for Respondent was entered on the entire verdict (Tr. 47-49), and Petitioner has never denied in any court that each and all of such findings are fully supported by the evidence.

In the Texas appellate courts, Petitioner devoted approximately one-half of his briefing to an argument, now abandoned, that two items of evidence, received by the trial court, were inadmissible hearsay. He left Special Issues Nos. 8 and 10 and the answers thereto (the findings of no negligence) completely unchalleneged. The remainder of his appellate briefing was devoted to attacks upon the language in which Special Issues Nos. 2 and 7 submitted his count of "implied warranty," and to a contention that Special Issue No. 15 (the issue submitting the defense of "abreaction") should not have been included in the charge at all. He made no attack whatever upon Special Issue No. 16, or the answer thereto (which answer constitutes a complete defense to his "implied warranty" claim), until his Motion for Rehearing in the Court of Civil Appeals.

Before proceeding—we need not labor the point; a jury has decided the material facts against Petitioner and in favor of Respondent—we feel compelled to state that the recital of "Material Facts" at pages 4-5 of the Petition for Writ of Certiorari is not accurate. The record will not support Petitioner's assertions that Petitioner noticed poor vision while he was taking MER/29 (p. 4),[3] that in "almost every in-

[3] Petitioner's own testimony was that he began having difficulty with his vision some *four months after* he had stopped taking MER/29. (S.F. 44.)

stance" the animals being clinically tested on MER/29 "subsequently developed eye disorders" (p. 4),[4] that "[a]fter the drug had been on the market a short time, Respondent received further reports that the drug caused cataracts" (p. 5),[5] and that Petitioner "produced evidence that five persons out of 86 in the Dallas area who had taken the drug developed cataracts as a result thereof" (p. 5).[6] Furthermore, the statements at page 18 of the Petition for Writ of Certiorari, that there have been "injurious effects of cataracts in at least 3000 users," and at page 20 of such Petition, that MER/29 caused cataracts "to develope in the eyes of thousands of consumers," are also without support in the evidence—Petitioner does not even try to cite a record reference for them—and they are untrue.

---

[4] The undisputed evidence is that, prior to the marketing of the drug, thousands of animals were tested, and only nine rats and two dogs in Respondent's laboratories had eye complaints, which complaints were not cataracts (S.F. 321, 534, 536; Plaintiff's Exhibits Nos. 21, 22) and the only other report of an eye involvement among any experimental animals came from a University of Florida professor who admitted that the "fragmentary information that can be derived" from her experiments with the drug was "inconclusive." (Defendant's Exhibit No. 11.)

[5] The undisputed evidence is that Respondent received the *first* report of a cataract claim among MER/29 users on February 1, 1961, eight months after MER/29 had gone on the market and one month before Petitioner ceased to use it (S.F. 649), and that the second report of a possible cataract claim occurred in October 1961, seven months after Petitioner had ceased to take MER/29. (S.F. 651.)

[6] A correct summary of the record is as follows. In February 1961, a Dallas doctor, Dr. Burnside, examined patients taking MER/29 to determine its effect upon the cholesterol level. (S.F. 162.) Although Dr. Burnside is an eye specialist, he did not observe cataracts in such persons. (S. F. 212.) Then, in December 1961, after Respondent had received reports of cataract claims, Dr. Burnside, at Respondent's request (S.F. 150), again examined persons in the Dallas area who had taken MER/29. There were more than eighty-six persons involved, but Dr. Burnside attempted to follow closely eighty-six patients (S.F. 217), and formed the opinion that three of them had sustained cataracts from taking MER/29 and that two others were "suspicious." (S.F. 218.) He did not be-

(footnote continued)

At pages 5-8 of the Petition for Writ of Certiorari, Petitioner asks this Court to review, and ultimately to reverse this case on the basis of, several objections to the charge which he says he "timely" made but which, in fact, he did not even make at the present trial. Specifically, we refer to the objection Petitioner cites as "Tr. 20-23" (Petition for Writ of Certiorari, p. 5, line 25), the requested special issues he cites as "Tr. 21, 22" (p. 5, line 27), the requested definition he cites as "Tr. 22" (p. 6, line 3), and the requested definition he cites as "Tr. 21-22" and quotes in full (p. 8, second paragraph), all of which are in a document that was filed on September 8, 1964 (Tr. 20), more than four months before this trial started. There have been two trials of this case. The first, in September 1964, ended with a mistrial after the charge had been prepared and the objections and requested special issues and instructions directed thereto had been filed. (S.F. 2.) The second trial took place in February and March of 1965; *it* is the trial now under review. (Tr. 47.) However, in preparing the appellate Transcript of the present case, the Dallas County district clerk mistakenly included therein, at pages 20-33, not the objections to the charge taken by Petitioner at *this trial*, but, instead, Petitioner's objections, definitions, and requested interrogatories from the *first* trial. When the district clerk's error was discovered, the

(footnote continued)
gin his examinations until December 1961 (nine months after Petitioner had ceased to use MER/29), and he did not report his findings to Respondent until June 1962. (Defendant's Exhibit No. 2.) The undisputed evidence is that, during the time Petitioner was taking MER/29, an estimated 262,000 people used it (S.F. 656, 816-818), and only one person had claimed to have developed cataracts. (S.F. 649, 656.)

original "Transcript" had already been filed in the Court of Civil Appeals, so, at Petitioner's request, the district clerk prepared, and there was filed in the Court of Civil Appeals, a document labeled "Supplemental Transcript," which consists of Petitioner's objections to the charge at *this* trial. Both the "Transcript" and the "Supplemental Transcript" have been certified to this Court, but the objections to the charge in the "Supplemental Transcript" are the only objections Petitioner ever made to the charge now under review. The objections and requests in the "Transcript" (the document Petitioner cites as "Tr.") were made and tendered at another trial and directed to a different charge.

ARGUMENT

I. The only issues in this case are issues of Texas common law.

Although the section labeled "Reasons for Granting the Writ" consumes pages 15-26 of the Petition for Writ of Certiorari, the only part of such section that has any bearing upon, or even mentions, the present case is the argument at pages 15-20. There, Petitioner complains that the portion of the charge which submitted his cause of action in "implied warranty" to the jury—i.e., Special Issues Nos. 2 and 7 and the definitions accompanying them—were "based on negligence concepts." (Petition for Writ of Certiorari 15-16). He contends that, in this respect, the charge did not follow the

Texas common law as set out in other Texas cases. (Ibid. 16-18.)[7] An analysis of the Petition shows that this general contention, which is hardly of constitutional proportions, consists only of two still narrower specific complaints.

Petitioner's first complaint—the only one he argues at any length—is that the trial court, he says, should not have submitted Special Issue No. 2, which inquired whether MER/29 was a "proximate cause"[8] of his cataracts, but, instead, should have submitted a special issue that inquired whether MER/29 was a "producing cause"[9] of such cataracts. (Petition for Writ of Certiorari 17-19.) In other words, he says that the charge should not have required him to prove that his cataracts "ought reasonably to have been foreseen" by Respondent "in an appreciable class or number of persons." He made this same argument under his Points of Error Nos. Four, Five, and Six in the Texas Court of

[7] The only such cases mentioned by Petitioner are *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. 2d 835 (1942); and *Burrus Feed Mills, Inc. v. Reeder*, 391 S.W. 2d 121 (Tex. Civ. App., 1965), no writ history.

[8] The trial court defined "proximate cause" as "that cause which in its natural and continuous sequence unbroken by any new and independent cause, produces a result, and without which cause, such result would not have occurred, and which result or some similar result ought reasonably to have been foreseen by a person of ordinary care in an appreciable class or number of persons, in the light of the attending circumstances. There may be more than one proximate cause of a result." (Tr. 36.)

[9] In his Motion for New Trial (Tr. 50-51), but not at the trial (Supp. Tr. 3-6), Petitioner tendered the following definition of producing cause: "a cause which in natural and continuous sequence, either alone or in conjunction with pre-existing body condition, brings about a condition of incapacity, and without which cause such incapacity would not have occurred. There may be more than one producing cause of a person's incapacity."

Civil Appeals (Petition for Writ of Certiorari 9-10), and to that court he described the essence of such argument as follows:

> "In essence, the question raised by the three points of error presented hereunder is whether in a case of products liability based on the implied warranty of fitness imposed by law *the plaintiff has the burden of proving as a requisite to recovery that the damages he sustained from using the product, in a manner in which it was designed to be used, were reasonably foreseeable by the defendant.* This is not the law of the State of Texas * * *." (Petitioner's Brief in Court of Civil Appeals 17, emphasis Petitioner's.)

Petitioner's other complaint is that, in submitting Special Issue No. 7 (whether the MER/29 consumed by Petitioner was unfit and unmerchantable), the trial court gave an inaccurate definition of "unfit and unmerchantable." (Petition for Writ of Certiorari 19-20.) The trial court defined "unfit and unmerchantable" as "that inherent condition which, after weighing utility against potential danger, means that a reasonable person would say that its use is injudicious." (Tr. 36.) Petitioner says that the phrase "after weighing utility against potential danger" should not have been included in the definition. (See Petitioner's Points of Error Nos. Eight and Nine in the Court of Civil Appeals, quoted at Petition for Writ of Certiorari 10, and his Thirteenth Point in the Texas Supreme Court, quoted at Petition for Writ of Certiorari 12.) In the Texas appellate courts, the sole reason he assigned in support of such contention was, not that the trial court's definition was unconstitutional, or even that it was "based on negligence con-

cepts," but simply that it was a "comment on the weight of the evidence." (Petitioner's Brief in Court of Civil Appeals 30; Petitioner's Application for Writ of Error in Supreme Court 37.)

Simply to state these contentions is to demonstrate that by no stretch of the imagination can it be said that any of them so much as touches on a constitutional problem. In particular, there is not the remotest connection—and Petitioner does not even try to suggest one—between those arguments and his claim, first asserted in this Court, that he was deprived of constitutional rights by the use of a special issue charge. Whether Special Issue No. 2 should have been phrased in terms of "producing cause" instead of "proximate cause," whether or not the definition accompanying Special Issue No. 7 was correct, whether Special Issues Nos. 2 and 7 use the language of "negligence concepts" instead of "implied warranty concepts"—these are nothing but issues of Texas common law, and, as his briefs make clear, Petitioner himself so recognized in the Texas courts.

II. The Court of Civil Appeals properly disposed of the issues in this case, and was correct in affirming the trial court's judgment.

Even if this Court were inclined to review a state decision on common law issues, there is no reason for it to do so in this case. For the many reasons set out in this section, the issues herein have been correctly decided and a judgment for Respondent was required.

In the first place, there is no merit to Petitioner's claim that the trial court made, or that the appellate courts ap-

proved, a submission of his "implied warranty" action on the basis of "negligence concepts."

Petitioner's contrary argument is founded upon a misapprehension as to the nature of this case. He says the Texas courts have made herein "an unwarranted and unconstitutional exception to" *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. 2d 835 (1942); and *Burrus Feed Mills, Inc. v. Reeder*, 391 S.W. 2d 121 (Tex. Civ. App., 1965), no writ history. The present case, however, constitutes no exception at all to those precedents; it is simply a different kind of case. *Decker*, *Josey*, and *Burrus* involved contaminated or adulterated products.[10] This case involves a product, MER/29, that was pure and uncontaminated and unadulterated and served its intended purpose, and the plaintiff seeks damages because of an alleged reaction to MER/29 which (despite nationwide use, and despite testing that has been established as sufficient by an unchallenged jury finding, Special Issue No. 8) had been complained of by only one other consumer from the synthesis of MER/29 in 1956 until the day Petitioner ceased to use it in 1961. The authorities agree that the contaminated product cases and this kind of case are "fundamentally different" and that "the impact of policy considerations demand that a distinction be made between them." *Keeton, "Products Liability—Liability Without Fault and the Requirement of a Defect,"* 41 Tex. L. Rev. 855, 859 (1963). What Petitioner mistakes for an exception to the contaminated products cases, and for a submission

[10] *Decker* involved contaminated sausage, *Josey* adulterated spinach, *Burrus* poisoned horse feed.

"based on negligence concepts," is a submission based on the implied warranty concepts applicable to this type of case.

The doctrine of implied warranty requires a pure product, an uncontaminated product, but, contrary to Petitioner's position, it does not require the manufacturer to discharge the impossible duty of furnishing a product which is absolutely safe for every possible user under all possible conditions. The requirement is that the product not be "unreasonably dangerous." *Restatement of Torts* 2d § 402A (1965). As said by an eminent authority on the subject, *Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)*," 69 Yale Law Journal 1099 (1960):

> "[T]he seller may expect, within some reasonable limits, that the product will be used by normal persons, and that he will not be held responsible when some idiosyncracy peculiar to the plaintiff makes him abnormally sensitive to a product quite harmless to ordinary people." (69 Yale L. J. 1144-1145.)

Accordingly, it is held by the overwhelming (if, indeed, not the unanimous) weight of authority that the "implied warranty" attending a product such as MER/29 does not run in favor of one who suffers an idiosyncratic or allergic reaction thereto unless such reaction is common to a reasonably substantial portion of the population; so that when, as here, evidence is produced that the plaintiff's reaction is allergic or idosyncratic, the plaintiff cannot recover under implied warranty upon proof merely that he consumed the product and that he sustained injury therefrom. He must *also* prove, as a condition to recovery, that, at the time the product was sold to him, the injuries of which he complains were common to a reasonably foreseeable and appreciable class or number

of potential users of the product. *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P. 2d 298 (1963); *Cochran v. Brooke*, Ore., 409 P. 2d 904 (1966); *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964); *Crotty v. Shartenberg's-New Haven, Inc.*, 147 Conn. 460, 162 A. 2d 513 (1960); *Casagrande v. F. W. Woolworth Co.*, 340 Mass. 552, 165 N.E. 2d 109 (1960); *Ray v. J. C. Penney Company*, 274 F. 2d 519 (10 Cir., 1959); *Magee v. Wyeth Laboratories, Inc.*, 29 Cal. Rptr. 322 (Cal. App., 1963); *Merrill v. Beaute Vues Corp.*, 235 F. 2d 893 (10 Cir., 1956); *Restatement of Torts* 2d §402A, comment j (1965). This, to repeat, is not a "negligence concept." It is an "implied warranty concept" that *must* be included in the charge in the type of implied warranty case shown by this record. Neither in this Court nor in any other has Petitioner ever cited a single authority to the contrary.

The foregoing answers Petitioner's complaints with respect to Special Issue No. 2. Petitioner would have had the trial court require him to prove only that he developed cataracts from MER/29—i.e., that MER/29 was a "producing cause" of his cataracts. Under the law of implied warranty as it applies to this record, Petitioner had to prove and obtain jury finding not only (1) that MER/29 caused his cataracts but also (2) that, at the time he used MER/29, such result was common to a reasonably foreseeable and appreciable class or number of potential users of MER/29. The trial court included both of these requirements by appropriate definition of the term "proximate cause," as used in

Special Issue No. 2.[11] The court was correct in so doing and would have been in error if it had acceded to Petitioner's request that the second element of Petitioner's proof be eliminated from the charge.

Furthermore, as noted by the Court of Civil Appeals:

> "For additional reasons appellant's complaint that the court erred in refusing to define 'producing cause' and to submit issues predicated thereon cannot be sustained. Appellant did not plead 'producing cause'. He pleaded that his damages were a 'proximate result' of appellee's breach of implied warranty. Further, he did not request issues on 'producing cause' by presenting to the court in writing copies of the requested issues which he desired the court to submit, which request under Rule 273, Texas Rules of Civil Procedure must be presented to the court separate and apart from a party's objections to the charge." 398 S.W. 2d 645.

Either of these additional reasons, in and of itself, is a sufficient basis for affirming the manner in which the trial court submitted Special Issue No. 2. It is settled Texas law that there is no error in refusing a requested submission that is not made by the pleadings, *Matthews v. General Accident Fire & Life Assur. Corp.*, 161 Tex. 622, 343 S.W. 2d 251 (1961), or tendered in compliance with the Texas Rules of Civil Procedure. *Texas Employers' Insurance Association v. Jones*, Tex., 393 S.W. 2d 305 (1965). The Petition for Writ of Certiorari nowhere contends otherwise or even mentions these holdings by the Court of Civil Appeals.

[11] As observed by the court in *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964), this element of Petitioner's proof—that his reaction was common to a substantial or appreciable class of persons—can be expressed in many different ways. The trial court in this case chose the language employed by the Washington Supreme Court in *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P. 2d 298, 304-305. Petitioner did not object to the manner in which the concept was phrased, but stood entirely upon his position that it should not be included in the charge at all.

As to Petitioner's complaint with respect to Special Issue No. 7, that the trial court's definition of "unfit and unmerchantable" was inaccurate, the definition is in accord with expert legal analysis—it is recommended by the article, *Keeton, "Products Liability—Current Developments,"* 40 Tex. L. Rev. 193, 210 (1961)—and, moreover, is nothing but simple common sense. Petitioner's own doctor testified that, in deciding whether to prescribe a drug—i.e., whether the drug is fit and merchantable—"you have to consider the patient's gravity of disease and weigh it with the side effects of the drug" (S.F. 222), just as the definition says. The Court of Civil Appeals held (1) that the definition was accurate and (2) that Petitioner could not attack it on appeal because at the trial he

> "made only a general objection to the court's definition of 'unfit and unmerchantable'. He did not point out distinctly the matter to which he objected or the grounds of his objection as required by Rule 274, T.R.C.P." 398 S.W. 2d 645.

The Petition for Writ of Certiorari makes no logical attack upon the first of these holdings and no attack at all upon the second.

There was no error (let alone any properly assigned error) in the submission of Petitioner's count of implied warranty. Furthermore, even if there had been, such error or errors would be immaterial, for two separate and independent reasons.

1. In answer to Special Issue No. 15, the jury found that Petitioner's cataracts resulted from an idiosyncratic reaction —an abreaction—to MER/29. (Tr. 43.) This finding is a complete defense to Petitioner's count of implied warranty.

Hursh, "American Law of Products Liability," § 8:2 (1961); 26 A.L.R. 2d 963 (1952); *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P. 2d 1007 (1964); *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 100 N.W. 2d 5 (1959); *Grau v. Proctor & Gamble Company*, 324 F. 2d 309 (5 Cir., 1963). Petitioner has never denied that this finding is fully supported by the evidence. The only argument he directed toward it in the Court of Civil Appeals had not been preserved on motion for new trial,[12] and, therefore, the Court of Civil Appeals declined to consider it, 398 S.W. 2d 645, and properly so. *St. Louis Southwestern Railway Company v. Gregory*, Tex., 387 S.W. 2d 27 (1965).

2. In answer to Special Issue No. 16, the jury found that, at the time Petitioner was using MER/29, the state of medical knowledge was such that Respondent could not, in the exercise of ordinary care, have anticipated that MER/29 could cause cataracts in the lens of the human eye. (Tr. 43.) This finding is another complete defense to Petitioner's count of implied warranty. *Lartigue v. R.J. Reynolds Tobacco Company*, 317 F. 2d 19 (5 Cir., 1963), cert. den. 375 U.S. 865 (1963); *Ross v. Philip Morris & Company*, 328 F. 2d 3 (8 Cir., 1964); *Restatement of Torts 2d*, § 402A, comment j (1965); *Keeton, "Products Liability—Liability Without Fault and the Requirement of a Defect,"* 41 Tex. L. Rev. 855, 869 (1963). Petitioner has never denied that this find-

[12] Such argument was that Special Issue No. 15 was "evidentiary." (Petitioner's Brief in Court of Civil Appeals 31.) See also Petitioner's Application for Writ of Error 37, where Petitioner contended only that such Issue was a "comment on the weight of the evidence." The argument, at Petition for Writ of Certiorari 18, that there is no such thing as an abreaction, is made here for the first time in any court and is contrary to the undisputed evidence. (See S.F. 674, 866.)

ing is fully supported by the evidence. He made no attack thereon at all in his motion for new trial or on original submission in the Court of Civil Appeals. See 398 S.W. 2d 647. His first challenge to that issue was on rehearing in the Court of Civil Appeals, at which time such Court was without jurisdiction to consider it, *Lone Star Gas Company v. Sheaner*, 157 Tex. 508, 305 S.W. 2d 150 (1957); *Aycock v. Travis County*, 255 S.W. 2d 910 (Tex. Civ. App., 1953), writ refused, and did not consider it.

Thus, even if the trial court had submitted Special Issue No. 2 in terms of "producing cause" and had accompanied Special Issues No. 7 with a definition of "unfit and unmerchantable" that was satisfactory to Petitioner, and even if Petitioner had then obtained favorable findings upon such issues, Petitioner would have been no better off, because *either* the unchallenged answer to Special Issue No. 15 *or* the unchallenged answer to Special Issue No. 16, each being a complete defense to his implied warranty action, requires a judgment, irrespective of the answers to Special Issues Nos. 2 and 7, that he take nothing against Respondent—the same as the judgment of the trial court in this case. See *Wortham v. Bull*, 19 S.W. 2d 211 (Tex. Civ. App., 1929), writ refused.

In summary, there are at least five separate and independently sufficient reasons why Petitioner's objections to the language in which the charge submitted his count of "implied warranty" constitute no basis for granting certiorari.

1. Such objections raise no federal issues.

2. Such objections were not well taken; the charge was correct.

3. Such objections were not properly preserved at the trial for appellate review; this fact was pointed out by the Court of Civil Appeals and has never been denied by Petitioner.

4. Such objections are immaterial because the jury's answer to Special Issue No. 15 (a complete defense to which Petitioner made no tenable challenge in the Texas courts) is sufficient, in and of itself, to support and compel the judgment for Respondent.

5. Such objections are immaterial because the jury's answer to Special Issue No. 16 (a complete defense to which Petitioner made no challenge at all in the Texas courts until it was far too late) is sufficient, in and of itself, to support and compel the judgment for Respondent.

III. The Petition for Writ of Certiorari does not and cannot show that the Texas special issue practice is unconstitutional.

There is no need to dwell upon Petitioner's argument (raised here for the first time in any court) that the Texas special issue practice (to which he consented in this case[13]) is unconstitutional. He cites no authority in support of his

[13] Under *Rule 277, Texas Rules of Civil Procedure,* a case may be submitted on a general charge "for good cause" or "on agreement of the parties." (See Petition for Writ of Certiorari B-1.) Petitioner made no attempt to obtain such an agreement nor any request for a general charge.

contention,[14] and there is none. Indeed, a similar practice is specifically authorized for use in the federal courts by *Rule 49(a), Federal Rules of Civil Procedure.* See *Edward E. Morgan Co. v. U.S.*, 230 F. 2d 896, 900 (5 Cir. 1956), cert. den. 351 U.S. 965 (1956).

The cases cited at pages 22-24 of the Petition for Writ of Certiorari are not even remotely in point. Two of them, *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360 (1957), and *Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227 (1959), were FELA cases; the instant case arises under state common law. Two others, *Copperweld Steel Company v. Industrial Commission of Ohio*, 324 U.S. 780 (1945) (in which, incidentally, certiorari was denied), and *Senior v. Braden*, 295 U.S. 422 (1935), involved the constitutionality of state statutes; no such issue is presented here. *Hansberry v. Lee*, 311 U.S. 32 (1940), was concerned with whether, as a matter of due process, one can be bound, under res judicata, by an in personam judgment to which he was not a party; and *Davis v. North Carolina*, 196 F. Supp. 488 (D.C.N.C. 1961), reversed, 310 F. 2d 904 (4 Cir., 1962), was a criminal case. None of these authorities has anything to do with implied warranty (let alone holds that Petitioner's objections to the

[14] The only authority he cites is a speech by a Texas district judge, which criticises special issues in strong (not to say intemperate) language, but never once suggests that their use violates any constitutional provision. The leading Texas authority on the subject concedes that the special issue system has some defects, but finds it preferable to the general verdict. Stayton, *"Texas' Approaches to the Parker Ideal and Her Shortcomings,"* 37 Tex. L. Rev. 845, 855 (1959). See *Barron and Holtzoff, Federal Practice and Procedure*, §1051 (1961).

charge either raise constitutional questions or have any merit); none of them even suggests that special issues are unconstitutional.

Before concluding, we note that Petitioner has nowhere tried to show, either by citation of authority or by attempt at logical analysis, just how the use of a special issue charge could possibly have prejudiced him in this case. The reason, we submit, is that he could not have made such a showing. Petitioner's real complaint is, not that a special issue charge was used, but that such charge did not conform to his notions of what the Texas law of implied warranty ought to be.

IV. The matters outside the record upon which Petitioner relies are immaterial to the issues in this case.

Unable to cite any law to support his theories, unable to find any helpful facts in evidence, Petitioner is reduced, at pages 25-26 of the Petition for Writ of Certiorari, to a demand that this Court grant certiorari on the basis of his own inflammatory assertions with respect to matters completely outside the record. Such an argument need not be dignified by lengthy reply. Petitioner has told this Court that the question he presents is whether the trial court had the right to employ a special verdict. He does not even try to show that the allegations at pages 25-26 of the Petition have anything to do with that issue, with the issue Petitioner really wants reviewed (whether the state courts have correctly applied the Texas law of implied warranty), or with any other issue in this case.

CONCLUSION

There is no federal question here, let alone a federal question timely and properly raised. The only issues are issues of state common law, and they were correctly decided by the Texas courts. Petitioner has shown nothing, and there is nothing, that could begin to justify review of this case by the Supreme Court of the United States. Respondent prays that certiorari be denied.

Respectfully submitted,

Donald L. Case

DONALD L. CASE,

Jack Pew, Jr.

JACK PEW, JR.,
4300 First National Bank Bldg.,
Dallas, Texas 75202,
Counsel for Respondent.

PROOF OF SERVICE

I, Jack Pew, Jr., one the Counsel for Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 15th day of November, 1966, I served a copy of the foregoing Respondent's Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Harvey L. Davis, 3315 Daniels, Dallas, Texas, 75205, Counsel for Petitioner.

Jack Pew, Jr.

Jack Pew, Jr.